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APPENDIX

JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967

No. 267

UNITED STATES OF AMERICA, PETITIONER,

v.

NEIFERT-WHITE COMPANY

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

**PETITION FOR CERTIORARI FILED JUNE 19, 1967
GRANTED OCTOBER 9, 1967**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

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v.

NEIFERT-WHITE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

| | Page |
|--|------|
| Relevant docket entries..... | 1 |
| Complaint | 2 |
| Motion to dismiss..... | 16 |
| Order denying motion to dismiss..... | 17 |
| Answer | 18 |
| Motion for judgment on the pleadings..... | 24 |
| Opinion and order of the district court..... | 25 |
| Judgment of the district court..... | 32 |
| Opinion of the court of appeals..... | 33 |
| Judgment of the court of appeals..... | 43 |
| Order allowing certiorari..... | 44 |

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MONTANA, HELENA DIVISION**

No. 1229

UNITED STATES OF AMERICA, Plaintiff,

v.

NEIFERT-WHITE Co., a Corporation, Defendant.

RELEVANT DOCKET ENTRIES

2/5/65 Complaint filed.
2/24/65 Defendant's motion to dismiss.
3/5/65 Order denying motion to dismiss.
3/23/65 Answer filed.
9/27/65 Defendant's motion for judgment on the pleadings.
12/6/65 District Court's opinion, order, and judgment.
1/20/67 Opinion and judgment of the Court of Appeals.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MONTANA, HELENA DIVISION.

Civil No. 1229

UNITED STATES OF AMERICA, Plaintiff,

v.

NEIFERT-WHITE Co., Corporation, Defendant.

COMPLAINT

Plaintiff complains and alleges as follows:

First Cause of Action

I

That this is a suit of a civil nature brought by the United States of America through its Attorney General, acting by Moody Brickett, United States Attorney for the District of Montana, wherein jurisdiction is invoked and relief is sought under the provisions of the False Claims Act, 31 U.S.C. §§231 and 232, et. seq.

II

That at all times herein mentioned, ~~the defendant, Neifert-~~ *the defendant, Neifert-* White Co., was a Montana Corporation with its principal place of business in Townsend, Montana.

III

That at ^{all} times hereip mentioned H. G. White was the executive vice-president of said corporation acting as a duly authorized agent of said corporation.

IV

That at all times herein mentioned qualified borrowers were eligible to obtain from plaintiff to finance the purchase of grain storage bins, loans not to exceed 80% of the actual

purchase price paid by said borrowers for said bins through plaintiff's Farm Storage Facility Loan Program existing pursuant to Section 4(h) of the Commodity Credit Corporation Charter Act, 7 U.S.C. §714b(h).

V

That during July of 1959 Elizabeth M. Foster of East Helena, Montana, bought two of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of \$650 each; that upon such purchase the defendant undertook to assist Elizabeth M. Foster in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of one of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated July 22, 1959, which falsely indicated thereon that the actual purchase price to be paid by Elizabeth M. Foster for each of said bins was \$725, that said false invoice was prepared, issued and utilized by defendant, acting through said H. G. White, with the intent and for the purpose of fraudulently inducing plaintiff to advance to Elizabeth M. Foster a loan in the amount of \$580 in violation of the provisions of said program when she was, in fact, then and there lawfully entitled and qualified to borrow only \$520 thereunder for such purpose as defendant well knew.

VI

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Elizabeth M. Foster as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to Elizabeth M. Foster the amount of \$580 which exceeded by \$60 the amount of \$520 she was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Second Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during July of 1959 Harold R. Myles of East Helena, Montana, bought one of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of \$650; that upon such purchase the defendant undertook to assist Harold R. Myles in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bin to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about July 16, 1959, which falsely indicated thereon that the actual purchase price to be paid by Harold R. Myles for said bin was \$698; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to Harold R. Myles a loan in the amount of \$558.40 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only \$520 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Harold R. Myles as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to Harold R. Myles the amount of \$558.40 which exceeded by \$38.40 the amount of \$520 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Third Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during July of 1959 John C. Walter of Townsend, Montana, bought one of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of \$629; that upon such purchase the defendant undertook to assist John C. Walter in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bin to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about July 14, 1959, which falsely indicated thereon that the actual purchase price to be paid by John C. Walter for said bin was \$725; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to John C. Walter a loan in the amount of \$578.40 in violation of the provisions of said program when he was in fact, then and there lawfully entitled and qualified to borrow only \$503.20 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of John C. Walter as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to John C. Walter the amount of \$578.40 which exceeded by \$75.20 the amount of \$503.20 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Fourth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during August of 1959 George Dundas of Tosten, Montana, bought one of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of \$664; that upon such purchase the defendant undertook to assist George Dundas in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bin to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about August 3, 1959, which falsely indicated thereon that the actual purchase price to be paid by George Dundas for said bin was \$762; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to George Dundas a loan in the amount of \$609.60 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only \$531.20 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of George Dundas as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to George Dundas the amount of \$609.60 which exceeded by \$78.40 the amount of \$531.20 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Fifth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First cause of Action.

II

That during July of 1959 D. L. Holloway of Townsend, Montana, bought three of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of \$2175.00; that upon such purchase the defendant undertook to assist D. L. Holloway in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about July 20, 1959, which falsely indicated thereon that the actual purchase price to be paid by D. L. Holloway for said bins was \$2632.50; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to D. L. Holloway a loan in the amount of \$2106.00 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only \$1820.00 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of D. L. Holloway as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to D. L. Holloway the amount of \$2106.00 which exceeded by \$286 the amount of \$1820.00 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Sixth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during July of 1959 Ruth McConnell of Waverly, Illinois, bought three of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of \$2175; that upon such purchase the defendant undertook to assist Ruth McConnell in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about September 18, 1959, which falsely indicated thereon that the actual purchase price to be paid by Ruth McConnell for said bins ~~was~~ \$2632.50; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to Ruth McConnell a loan in the amount of \$2106 in violation of the provisions of said program when she was, in fact, then and there lawfully entitled and qualified to borrow only \$1740 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Ruth McConnell as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to Ruth McConnell the amount of \$2106 which exceeded by \$366 the amount of \$1740 she was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Seventh Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during July of 1959 V. R. Cazier & Sons of Tosten, Montana, bought three of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of \$2640; that upon such purchase the defendant undertook to assist V. R. Cazier & Sons in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about July 24, 1959, which falsely indicated thereon that the actual purchase price to be paid by V. R. Cazier & Sons for said bins was \$2979; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to V. R. Cazier & Sons a loan in the amount of \$2383 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only \$2112 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of V. R. Cazier & Sons as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to V. R. Cazier & Sons the amount of \$2383 which exceeded by \$271 the amount of \$2112 they were then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Eighth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during August of 1959 Charles P. Ruth of Townsend, Montana, bought two of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of \$1450; that upon such purchase the defendant undertook to assist Charles P. Ruth in obtaining from plaintiff undersaid program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about August 7, 1959, which falsely indicated thereon that the actual purchase price to be paid by Charles P. Ruth for said bins was \$1700; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to Charles P. Ruth a loan in the amount of \$1360 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only \$1160 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Charles P. Ruth as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to Charles P. Ruth the amount of \$1360 which exceeded by \$200 the amount of \$1160 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Ninth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during August of 1959 James E. Miller of Tosten, Montana, bought three of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of \$1950; that upon such purchase the defendant undertook to assist James E. Miller in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program defendant's invoice of said sale dated on or about August 15, 1959, which falsely indicated thereon that the actual purchase price to be paid by James E. Miller for said bins was \$2175; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to James E. Miller a loan in the amount of \$1740 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only \$1560 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of James E. Miller as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to James E. Miller the amount of \$1740 which exceeded by \$180 the amount of \$1560 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Tenth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during August of 1959 Jack C. Nelson of Townsend, Montana, bought three of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of \$1950, that upon such purchase the defendant undertook to assist Jack C. Nelson in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about August 1, 1959, which falsely indicated thereon that the actual purchase price to be paid by Jack C. Nelson for said bins was \$2175; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to Jack C. Nelson a loan in the amount of \$1740 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only \$1560 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Jack C. Nelson as aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to Jack C. Nelson the amount of \$1740 which exceeded by \$180 the amount of \$1560 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Eleventh Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during August of 1959 Wm. R. and Robert H. Kimpton of Tosten, Montana, bought two of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of \$1300; that upon such purchase the defendant undertook to assist Kimptons in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bins to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about August 13, 1959, which falsely indicated thereon that the actual purchase price to be paid by Wm. R. and Robert H. Kimpton for said bins was \$1450; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to Wm. R. and Robert H. Kimpton a loan in the amount of \$1160 in violation of the provisions of said program when they were, in fact, then and there lawfully entitled and qualified to borrow only \$1040 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Wm. R. and Robert H. Kimpton aforesaid, and not otherwise, plaintiff, through its aforesaid agency, was induced to loan and did loan to Wm. R. and Robert H. Kimpton the amount of \$1160 which exceeded by \$120 the amount of \$1040 they were then and there lawfully qualified and entitled to borrow from plaintiff under said program.

Twelfth Cause of Action

I

Plaintiff realleges paragraphs I, II, III and IV of its First Cause of Action.

II

That during September of 1959 Don F. Scofield of Three Forks, Montana, bought one of such grain storage bins from defendant in Townsend, Montana, for an actual purchase price of \$750; that upon such purchase the defendant undertook to assist Don F. Scofield in obtaining from plaintiff under said program a loan in excess of 80% of the actual purchase price of said bin to finance the cost thereof, and for such purpose caused to be prepared and presented to the Agricultural Stabilization and Conservation (ASC) Committee for Lewis and Clark County, Montana, plaintiff's local processing agency for loan applications under said program, defendant's invoice of said sale dated on or about September 18, 1959, which falsely indicated thereon that the actual purchase price to be paid by Don F. Scofield for said bin was \$850; that said false invoice was prepared, issued and utilized by defendant with the intent and for the purpose of fraudulently inducing plaintiff to advance to Don F. Scofield a loan in the amount of \$680 in violation of the provisions of said program when he was, in fact, then and there lawfully entitled and qualified to borrow only \$600 thereunder for such purpose as defendant well knew.

III

That because of defendant's preparation, issuance and utilization of said false and fraudulent invoice in connection with the purchase and loan application of Don P. Scofield as aforesaid, and not otherwise, plaintiff, though its aforesaid agency, was induced by loan and did loan to Don F. Scofield the amount of \$680 which exceeded by \$80 the amount of \$600 he was then and there lawfully qualified and entitled to borrow from plaintiff under said program.

WHEREFORE, plaintiff prays for judgement against defendant as follows:

1. For the statutory forfeiture penalty of \$2000 each on plaintiff's causes of action One through Twelve;
2. For plaintiff's costs of suit; and,
3. For such other and further relief as is just and proper.

Dated this 4th day of February, 1965.

Moody Brickett, United States Attorney for the
District of Montana. Clifford E. Schleusner,
Assistant United States Attorney for the Dis-
trict of Montana, Attorneys for Plaintiff. Ad-
dress: Federal Building, Billings, Montana.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MONTANA, HELENA DIVISION.

Civil Action File No. 1229

UNITED STATES OF AMERICA, Plaintiff,

vs.

NEIFERT-WHITE Co., a Corporation, Defendant.

MOTION TO DISMISS

Comes now the defendant, Neifert-White Co., a corporation, by its attorney and moves the Court as follows:

I

To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

II

To dismiss the action because the eleven several causes of action each fails to state a claim against this defendant upon which relief can be granted.

Dated this 23rd day of February, 1965.

Patrick F. Hooks, 218 Broadway, Townsend, Montana, Attorney for Defendant, Neifert-White Co., a Corporation.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MONTANA, HELENA DIVISION.

No. 1229

UNITED STATES OF AMERICA, Plaintiff,

VS.

NEIFERT-WHITE Co., a Corporation, Defendant.

ORDER

The defendant's Motion to Dismiss having been filed herein on the 24th day of February, 1965, and said motion not having been supported by a brief filed in accordance with the provisions of Rule 7 of the Rules of this Court,

IT IS THEREFORE ORDERED and this does order that the said Motion to Dismiss be and the same hereby is denied, and the defendant is granted 20 days within which to further plead.

Done and dated this 5th day of March, 1965.

W. D. Murray, United States District Judge.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MONTANA, HELENA DIVISION.

No. 1229

UNITED STATES OF AMERICA, Plaintiff,

vs.

NEIFERT-WHITE Co., a corporation, Defendant.

ANSWER

Defendant for answer to plaintiff's complaint, admits, denies and alleges:

First Defense

The complaint fails to state a claim against this defendant upon which relief can be granted in any or all of the twelve several causes of action.

Second Defense

First Cause of Action

I

Defendant admits each and all of the allegations contained in paragraphs I, II, III, and IV of the first cause of action and likewise admits the allegations of said paragraphs as the same are realleged by reference in paragraph I of the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Cause of Action.

II

Answering paragraph V of the first cause of action, defendant admits that at or about the time alleged in the complaint, Elizabeth M. Foster did purchase two grain storage bins from the defendant in Townsend, Montana; Admits the defendant gave to Elizabeth M. Foster an invoice, receipt or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph V;

III

Answering paragraph VI of the first cause of action, defendant denies the allegations therein contained.

Second Cause of Action

I

Answering paragraph II of the second cause of action, defendant admits that at or about the time set forth in the complaint, Harold R. Myles bought one grain storage bin from the defendant in Townsend, Montana; Admits that defendant gave to Harold R. Myles an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the second cause of action, the defendant denies each and all of the allegations therein contained.

Third Cause of Action

I

Answering paragraph II of the third cause of action, defendant admits that at or about the time set forth in the complaint, John C. Walter bought one grain storage bin from the defendant in Townsend, Montana; Admits that defendant gave to John C. Walter an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the third cause of action, the defendant denies each and all of the allegations therein contained.

Fourth Cause of Action

I

Answering paragraph II of the fourth cause of action, defendant admits that at or about the time set forth in the complaint, George Dundas bought one grain storage bin from the defendant in Townsend, Montana; Admits that defendant gave to George Dundas an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the fourth cause of action, the defendant denies each and all of the allegations therein contained.

Fifth Cause of Action

I

Answering paragraph II of the fifth cause of action, defendant admits that at or about the time set forth in the complaint, D. L. Holloway bought three grain storage bins from the defendant in Townsend, Montana; Admits that defendant gave to D. L. Holloway an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the fifth cause of action, the defendant denies each and all of the allegations therein contained.

Sixth Cause of Action

I

Answering paragraph II of the sixth cause of action, defendant admits that at or about the time set forth in the complaint, Ruth McConnell bought three grain storage bins from the defendant in Townsend, Montana; Admits

that defendant gave to Ruth McConnell an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the sixth cause of action, the defendant denies each and all of the allegations therein contained.

Seventh Cause of Action

I

Answering paragraph II of the seventh cause of action, defendant admits that at or about the time set forth in the complaint, V. R. Cazier & Sons bought three grain storage bins from the defendant in Townsend, Montana; Admits that defendant gave to V. R. Cazier & Sons an invoice, bill of sale or other sales slip evidencing said sales; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the seventh cause of action, the defendant denies each and all of the allegations therein contained.

Eighth Cause of Action

I

Answering paragraph II of the eighth cause of action, defendant admits that at or about the time set forth in the complaint, Charles P. Huth bought two grain storage bins from the defendant in Townsend, Montana; Admits that defendant gave to Charles P. Huth an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the eighth cause of action, the defendant denies each and all of the allegations therein contained.

Ninth Cause of Action

I

Answering paragraph II of the ninth cause of action, defendant admits that at or about the time set forth in the complaint, James E. Miller bought three grain storage bins from the defendant in Townsend, Montana; Admits that defendant gave to James E. Miller an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the ninth cause of action, the defendant denies each and all of the allegations therein contained.

Tenth Cause of Action

I

Answering paragraph II of the tenth cause of action, defendant admits that at or about the time set forth in the complaint, Jack C. Nelson bought three grain storage bins from the defendant in Townsend, Montana; Admits that defendant gave to Jack C. Nelson an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the tenth cause of action, the defendant denies each and all of the allegations therein contained.

Eleventh Cause of Action

I

Answering paragraph II of the eleventh cause of action, defendant admits that at or about the time set forth in the complaints, Wm. R. and Robert H. Kimpton bought two grain storage bins from the defendant in Townsend,

Montana; Admits that defendant gave to Wm. R. and Robert H. Kimpton an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the eleventh cause of action, the defendant denies each and all of the allegations therein contained.

Twelfth Cause of Action

I

Answering paragraph II of the twelfth cause of action, defendant admits that at or about the time set forth in the complaint, Don F. Scofield bought one grain storage bin from the defendant in Townsend, Montana; Admits that defendant gave to Don F. Scofield an invoice, bill of sale or other sales slip evidencing said sale; Denies each and all of the remaining allegations contained in paragraph II.

II

Answering the allegations contained in paragraph III of the twelfth cause of action, the defendant denies each and all of the allegations therein contained.

III

Defendant denies each and every allegation, matter and thing contained in the twelve several causes of action which is not hereinabove specifically admitted, denied or otherwise qualified.

WHEREFORE, having fully answered, defendant prays that the complaint be dismissed, that defendant have judgment for his costs and for such other and further relief as is just and proper.

Dated this 21st day of March, 1965.

s/Patrick F. Hooks, 218 Broadway, Townsend, Montana, Attorney for Defendant, Neifert-White Co.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MONTANA, HELENA DIVISION.

Civil Action No. 1229

UNITED STATES OF AMERICA, Plaintiff

vs.

NEIFERT-WHITE Co., a corporation, Defendant

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now NEIFERT-WHITE Co., a corporation, the defendant above-named, and moves the Court to enter judgment on the pleadings in favor of defendant herein on the ground that defendant is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

Dated this 24th day of September, 1965.

Patrick F. Hooks, Office and Post Office Address:
218 Broadway, Townsend, Montana. Hughes and
Bennett. By Michael J. Hughes, Office and Post
Office Address: 11 Edwards Street, P. O. Box 1166,
Helena, Montana, Attorneys for Defendant.

Filed December 6, 1965

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MONTANA, HELENA DIVISION.

OPINION AND ORDER No. 1229

UNITED STATES OF AMERICA, Plaintiff

v.

NEIFERT-WHITE Co., a corporation; Defendant

OPINION AND ORDER OF THE DISTRICT COURT

This is a civil action brought by the government under the provisions of the False Claims Act, 31 U.S.C. § 231 et seq. to recover the penalties provided by that Act. Jurisdiction of the action is expressly conferred on this court by 31 U.S.C. § 232(A).

Section 231 of Title 31 provides in pertinent part as follows:

"Any person not in the military or naval forces of the United States * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claims to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry * * * shall forfeit and pay to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit, and such forfeiture and damages shall be sued for in the same suit."

The complaint alleges that at all times pertinent to the action there existed, pursuant to Section 4(h) of the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714(b)(h), the government's Farm Storage Facility Loan Program under which qualified borrowers were eligible to obtain from the government to finance the purchase of grain storage bins, loans of not to exceed 80% of the actual purchase price paid by the borrower for said bins. The complaint contains 12 causes of action in each of which it is charged with respect to a different borrower under the program that the defendant, a dealer in grain storage bins, assisted the respective borrowers to obtain loans in excess of 80% of the purchase price actually paid for the grain storage bins purchased by furnishing false invoices which showed the purchase price of the respective bins purchased to be greater than the purchase price actually paid. As an example, in the First Cause of Action, it is alleged that the actual price for which the bins were sold to a named borrower was \$650 each, on which, under the program, the borrower would have been entitled to a loan of only \$520 each, but that defendant furnished an invoice showing the price paid for the bins was \$725 each, and thereby the borrower obtained loans of \$580 on each bin. The remaining causes of action contain similar allegations with respect to different borrowers. The government concedes that there was no default on any of the loans and that it suffered no damage, and seeks only the penalty provided by the Act on each count.

Defendant filed an answer in which the First Defense to each cause of action was that the complaint failed to state a claim upon which relief can be granted, and thereafter moved for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. At the time of pretrial conference the motion for judgment on the pleadings was heard and briefs in support of and in opposition to the motion were submitted, and the motion was taken under advisement.

Preliminarily it should be noted that the motion is timely since it was made after the pleadings were closed and within such time as not to delay the trial of the action, as required by Rule 12(c).

Defendant's position on the motion is that the loan applications by the various borrowers, which were supported by the allegedly false invoices furnished by defendant, are not false claims against the government within the meaning of the False Claims Statute, 31 U.S.C. § 231. After considering the briefs of the parties and the authorities cited therein, the court is of the opinion that the defendant's position is correct.

At the outset it should be pointed out that the False Claims Act was not designed to reach every fraud practiced upon the government. As the Court of Appeals for the Ninth Circuit stated in *United States v. Howell*, 318 F. 2d 162 (1963) at page 165:

"If the (False Claims) Act were intended to cover any and all attempts to cheat the United States, we doubt that the Congress would have used the word 'claim' to specify such an intent. The Supreme Court of the United States has made it clear that the 'False Claims Act was not designed to reach every kind of fraud practiced on the Government.' *United States v. McNinch*, *supra*, 356 U.S., at 599, 78 S. Ct. at 953, 2 L. Ed 1001. See also *United States v. Cochran*, *supra*, 235 F. 2d at 131-134."

In *United States v. Cohn*, 270 U.S. 339, at 345-346 (1926) the Supreme Court defined what is a claim within the meaning of the False Claims Act in the following words:

"While the word 'claim' may sometimes be used in the broad juridical sense of a 'a demand for some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty,' *Prigg v. Pennsylvania*, 16 Pet. 539, 615, it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant." [Emphasis supplied.]

In *United States v. McNinch*, 356 U.S. 595 (1958) the Supreme Court found the above quoted 1926 definition still relevant in determining what is a claim within the meaning of the False Claims Act. This definition has also been adopted and applied in the Ninth Circuit in *United States v. Howell*, *supra*, and in the Third Circuit in *United States v. Tieger*, 234 F. 2d 589 (1956).

Applying the above definition of a "claim" to the facts alleged in the complaint in the instant case, it immediately becomes apparent that the loan applications presented to the government by the borrowers, supported by the false invoices furnished by defendant were not "claims for money or property to which a *right* was asserted against the Government based on the Government's own liability" to the borrowers, because the Government was under no liability to those borrowers. The loan applications herein involved were not claims against the government for money to which the borrowers were asserting a right based on some liability of the government to the borrowers; rather they were requests for the loan of money.

In 54 C.J.S. "Loans", p. 654, it is stated

"A loan of money has been defined as a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows * * * A loan of money is something more than the mere delivery of money by the owner to another. In order to constitute a loan there must be a contract whereby, in substance, one party transfers to the other a sum of money which the other agrees to repay absolutely, together with such additional sums as may be agreed on for its use."

Viewing a loan as a contract, an application for a loan is an invitation to enter a contract. In *United States v. Tieger*, 234 F. 2d 589 (1956) the Court of Appeals for the Third Circuit noted at 591,

"But this privilege of contracting certainly is not a claim in normal business or legal usage and terminology."

And in footnote 7 in the *Tieger* case on 591, the court observed

“The ‘claim’ must be presented for ‘payment or approval.’” This describes the usual procedure in making a demand for money or property but is not an apt characterization of what is done in calling upon another to enter a contract.”

The decisions in *United States v. Tieger*, *supra*, which incidentally was approved by the Supreme Court in *United States v. McNinch*, *supra*, and *United States v. Veneziale*, 268 Fed. 504 (1959), both decided in the Third Circuit, are illustrative of the proposition that in order for there to be a claim within the meaning of the False Claims Act, the claim must be founded as of right upon the government's own liability to the claimant. Both cases involved false statements made to the Government by the defendants, through private lending institutions, for the purpose of obtaining home improvement loans which were subsequently insured by the Government under Title I of the Federal Housing Act. In the *Tieger* case, the loans were subsequently repaid by the borrowers and no claim against the Government under its loan insurance ever resulted. The Third Circuit held that no offense under the False Claims Act was established, even though false statements resulted in the Government issuing insurance on the loans, because no claim was made against the Government based on its own liability. On the other hand, in the *Veneziale* case, the borrowers defaulted on the loans, and the lending institutions made a claim against the Government for repayment of the loans based on the loan insurance which it had issued as a result of the false statements presented to it. In this case the court found an offense under the False Claims Act because the Government found itself faced with an enforceable demand for money based upon its liability under the loan insurance which it had been fraudulently induced to issue.

In this case, the loan applications, even though supported by false invoices, did not constitute an enforceable demand for money on the Government based on any liability of the Government to the borrowers.

In opposition to the motion the Government relies on the cases of *Rainwater v. United States*, 356 U.S. 590 and the cases of *Toepleman v. United States*, *United States v. Cato* and *United States v. McNinch*, decided in a joint opinion at 242 F. 2d 359 and 356 U.S. 595. In the *Rainwater* case the only question presented and decided was whether a claim against Commodity Credit Corporation was a claim against the United States within the meaning of the False Claims Act. The Supreme Court decided that it was. No question was raised or decided in that case as to what constitutes a claim within the meaning of the Act. The same is also true of the *Cato* and *Toepleman* cases. With reference to those cases the Supreme Court said at 356 U.S. 596 "The Court of Appeals reversed on the ground that a false claim against Commodity was not a claim 'against the Government of the United States, or any department or officer thereof' within the meaning of that Act. The sole question before us so far as these two actions are concerned, is whether the Court of Appeals erred in so deciding. For the reasons set forth in *Rainwater* we hold that it did." Therefore, it is obvious that the *Rainwater*, *Cato* and *Toepleman* cases are no authority for the Government's position here.

The *McNinch* case is directly against the Government's position, and supports the views hereinbefore expressed. In that case at 356 U.S. 599, the Supreme Court said:

"At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government. From the language of that Act, read as a whole in the light of normal usage, and the available legislative history, we are led to the conclusion that an application for credit insurance does not fairly come within the scope that Congress intended the Act to have."

The Government also relies on *United States v. Cherokee Implement Company*, 216 F. Supp. 374. In that case the court stated:

"In all these cases where money was actually paid out in response to a false application for a loan, it was a claim within 31 U.S.C.A. 231."

The cases referred to are *McNinch*, *Rainwater* and *Veneziale*, *supra* and *Smith v. United States*, 287 F. 2d 299; *United States v. Brown*, 274 F. 2d 107 and *United States v. Globe Remodeling Co., Inc.*, 196 F. Supp. 652. None of the cases involved moneys paid out as a result of an application for a loan except *Rainwater*, and as pointed out above the question of whether an application for a loan is a claim was neither raised or decided. *McNinch* involved, as above indicated, an application for credit insurance and it was there decided that a false application for credit insurance was not a false claim within the meaning of the Act. *Veneziale*, as pointed out above, involved a claim under the government's liability on credit insurance it had been fraudulently induced to issue *Smith v. United States* involved the submission of false quarterly reports from which rentals to be paid under a lease from the Federal Government were to be determined. *United States v. Brown* involved false claims for support prices on tobacco. *United States v. Globe Remodeling Co.*, like *Veneziale*, involved a false claim against the Government on its liability on credit insurance it had fraudulently been induced to issue under the Federal Housing Act. For these reasons the court does not find the *Cherokee Implement Co.* case convincing.

THEREFORE, IT IS ORDERED and this does order that the defendant's motion for judgment on the pleadings be and the same is hereby granted, and each cause of action, and the complaint and the action is hereby ordered dismissed on the ground that neither the complaint nor any of its causes of action states a claim for relief under the provisions of 31 U.S.C., Section 231.

Done and dated this 3rd day of December, 1965.

W. D. Murray, United States District Judge.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MONTANA, HELENA DIVISION.

Civil Action File No. 1229

UNITED STATES OF AMERICA, Plaintiff

vs.

NEIFERT-WHITE Co., a corporation, Defendant

JUDGMENT

This action came on for hearing on Defendant's Motion for Judgment on the Pleadings before the Court, Honorable W. D. Murray, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Orderd and Adjudged that the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth Causes of Action, and the Complaint, and the action be dismissed on the ground that neither the complaint nor any of its causes of action state a claim for relief under the provisions of 31 U.S.C., Sec 231.

Dated at Butte, Montana—this 6th of December, 1965.

/s/ John J. Parker, Clerk of Court.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,945

UNITED STATES OF AMERICA, Appellant,

vs.

NEIFERT-WHITE Co., a corporation, Appellee.

[January 20, 1967]

Appeal from the United States District Court for the
District of Montana

Before: CHAMBERS, HAMLEY and DUNIWAY, Circuit Judges
HAMLEY, Circuit Judge:

The United States brought this action against Neifert-White Company, based upon the civil provisions of the False Claims Act (Act), R.S. § § 3490 and 5438 (1875), 31 U.S.C. § 231 (1964).¹ Defendant answered and moved

¹ The statute, as set forth in 31 U.S.C. § 231, reads in part as follows:

“Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval, . . . any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, . . . shall forfeit and pay to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.”

In bringing this action under the False Claims Act, based upon the transactions described above, the Government did not assert that it had sustained any damages. Accordingly, the Government sought recovery only of the \$2,000 statutory penalty for each of twelve alleged violations, as authorized by section 231, aggregating \$24,000.

for judgment on the pleadings. The district court granted the motion and entered a judgment dismissing the action. *United States v. Neifert-White Company*, D.C. Mont., 247 F.Supp. 878. The Government appeals.

The facts of this case are not in dispute: Neifert-White is in the business of selling grain storage bins to farmers in Montana. Under the government Farm Storage Facility Loan Program, any grain grower purchasing grain storage bins could make application to borrow from the Commodity Credit Corporation (C.C.C.) an amount not to exceed eighty percent of the actual purchase price of these bins.²

Each applicant was required to submit a loan application to the local Agricultural Stabilization and Conservation Committee, accompanied by an invoice for the actual cost of the grain storage bins. During 1959 Neifert-White sold grain storage bins to twelve growers and assisted each of them in obtaining a loan from the C.C.C. An officer of Neifert-White prepared false invoices which overstated the sales price of the storage bins sold, enabling the purchasers to qualify for larger loans. Relying upon these false invoices, the C.C.C. approved loans to the twelve applicants in excess of eighty percent of the bins' actual purchase price.

The district court granted Neifert-White's motion for judgment on the pleadings on the ground that the loan applications to the C.C.C. were not "claims" within the meaning of the Act. The court reasoned that the loan applications "... were not claims against the government for money to which the borrowers were asserting a right based on some liability of the government to the borrowers; rather they were requests for the loan of money." 247 F.Supp. at 881. Such applications, the court held, were no more than unenforceable invitations to enter into loan contracts.

² This program existed pursuant to the provisions of Section 4(h) of the Commodity Credit Corporation Charter Act, 62 Stat. 1070 (1948), as amended, 15 U.S.C. § 714b(h) (1964), and is administered pursuant to that agency's Farm Storage Facilities regulations, 7 CFR § 1474.721-769.

The Government concedes that there was no legal obligation on the part of the United States to approve the grain growers' applications for such loans. It argues, in effect, however, that where an application to the Government is for the purpose of obtaining the disbursement or transfer of federal funds or property, it constitutes a "claim" within the meaning of the Act, even though the applicant does not assert an enforceable legal right to such disbursement or transfer. There is no question that these applications were for the disbursement of federal money.

The meaning which the Government would give to the statutory term "claim," is contrary to that expressed in *United States v. Cohn*, 270 U.S. 339, involving a criminal prosecution for a violation of the Act. The Supreme Court there made it clear that a "claim" under that Act involves two elements, both of which must be present, namely: (1) an effort to obtain a disbursement or transfer of federal funds or property, (2) to which funds or property a right is asserted against the Government, based upon the Government's own liability to the claimant.³ The second of these two elements is lacking in our case.

The Government argues that the pronouncement in *Cohn*, that a claim against the Government relates to money or property to which a right is asserted against the Government is dictum and should be disregarded. In support of this view, the Government contends that, in *Cohn*, the Supreme Court held for the defendant on the ground that since

³ The Court there stated:

"While the word 'claim' may sometimes be used in the broad juridical sense of a 'demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty,' *Prigg v. Pennsylvania*, 16 Pet. 539, 615, it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant." (270 U.S. at 345-346.)

the property the defendant sought to obtain was duty-free merchandise in the possession of the collector of customs, there had been no effort to obtain any funds or property belonging to the Government. Therefore, the Government argues, the Supreme Court's statement in *Cohn*, concerning the necessity of an assertion of right against the Government, "was entirely gratuitous."

It is questionable whether a lower federal court may, with propriety, disregard a clear pronouncement in a decision of the Supreme Court of the United States, even though, analytically, it may constitute dictum.⁴ However, passing this, we think that this statement in the *Cohn* opinion is not dictum, but is part of the rationale of that decision. In effect the Supreme Court said that there was no "claim" under the Act for either of two reasons, namely: (1) no right was asserted against the Government based upon the Government's own liability, and (2) the property which was sought and obtained was not that of the United States. Where an appellate court decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537.

The Government further argues, however, that the Supreme Court's subsequent decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, precludes reliance on the *Cohn* statement that, to be a "claim" under the Act, the effort to obtain federal funds or property must be founded on an asserted right against the Government. The Government made precisely the same contention in *United States v. Howell*, 9 Cir., 318 F.2d 162, 165. We rejected the contention in that case for reasons which we still find persuasive.

⁴ In *United States v. Howell*, 9 Cir., 318 F. 2d 162, 165, note 2, this court, dealing with a similar contention concerning this pronouncement in *Cohn*, quoted with approval *United States v. Tieger*, 3 Cir., 234 F.2d 589, 592, where it was said that:

"... to an inferior federal court, such a plain statement of a statute's meaning, adopted by the Supreme Court as the basis of its decision is much more than "dictum," however apparent it may seem to analysts that the court could have gone on a narrower ground, had it chosen to do so."

Moreover, in its later decision in *United States v. McNinch*, 356 U.S. 595, 600, n. 10, the Supreme Court indicated its continued acceptance of the *Cohn* construction of the Act, quoting the same language from *Cohn* that we have set out in note 3, above. In *McNinch*, the Supreme Court discussed the question of whether the transaction there in issue involved an assertion of right against the Government. *McNinch* at pages 598-599. However, the Court did not resolve that question. Instead the Court held that no claim was involved because no immediate disbursement of federal funds was sought. Nevertheless, the repetition of the *Cohn* definition at the end of the *McNinch* opinion, as a statement having "relevancy" in determining what constitutes a claim under the Act, demonstrates that this definition was not impaired by *Hess*, and is still recognized as a correct interpretation of the statute.

In holding that the *Cohn* definition of a "claim" under the Act has not been disavowed in later Supreme Court decisions, we are reaffirming a similar determination made in *United States v. Howell*, 9 Cir., 318 F.2d 162, 164-165. In there construing the statute as limited to efforts to obtain federal funds or property on the basis of an assertion of right, we observed:

"If the Act were intended to cover any and all attempts to cheat the United States, we doubt that the Congress would have used the word 'claim' to specify such an intent." (318 F.2d at 165)

It is true, as the Government contends, that it was not necessary to our decision in *Howell*, to hold that the *Cohn* definition includes, as one element, an assertion of right against the Government. Nevertheless, we find persuasive the reasons there stated for the view that the entire *Cohn* definition continues to represent the view of the Supreme Court.

Arguing, in effect, that our interpretation of *Cohn*, *Hess* and *McNinch*, as expressed in *Howell*, and in this opinion, must be erroneous, the Government cites the decisions of several courts of appeals which, it believes, show that the "assertion of right" element of the *Cohn* definition is generally disregarded. In each of these cases the Government prevailed and the court of appeals decision contains

no language expressly accepting the "assertion of right" element of the *Cohn* definition of "claim."

In five of the cases so cited, the "assertion of right" element was not discussed on appeal, but the transaction under consideration apparently did involve an assertion of right against the Government. Thus, in *United States v. Lagerbusch*, 3 Cir., 361 F.2d 449, federal funds were caused to be disbursed under an assertion of right arising under a cost-plus contract between Hercules Powder Company and the Government. The only contention made on appeal, however, and rejected, was that since the defendant did not deal directly with the Government, but with its cost-plus contractor, the Act did not apply.

In *United States v. Brown*, 4 Cir., 274 F.2d 107, federal funds were caused to be disbursed under an assertion of right in connection with a price support program administered by the C.C.C., and pursuant to a contract between it and a local cooperative. However, the only contention made on appeal, and rejected, was that defendant's fraudulent application to the local cooperative should not be regarded as an effort to obtain federal funds through the C.C.C.

Likewise, in *United States v. Alperstein*, S.D. Fla., 183 F.Supp. 548, *aff.*, 5 Cir., 291 F.2d 455, a veteran's application for hospital service from a Veteran's Administration hospital involved an assertion of right because the Administration was required by statute to provide hospital service to an eligible veteran. On appeal the only contention made was that the rendition of hospital service did not constitute a claim for "money or property" within the meaning of the Act. The contention was rejected in affirming judgment against the defendant.

In *Smith v. United States*, 5 Cir., 287 F.2d 299, there was an assertion of right to federal reimbursement and credits under a lease between the Government and a housing authority. The defendant director of the housing authority contended that the Act was inapplicable because it was not he, but the housing authority that received the benefit of his fraud in reporting excessive expenses. The court rejected this contention, holding that the Act applies even

where there is no direct liability running from the Government to the claimant.⁵

In *United States v. DeWitt*, 5 Cir., 265 F.2d 393, a real estate dealer fraudulently caused a lending institution to make assertions of right against the Government based upon a mandatory statute, which required the Government to pay a certain percentage of a qualified veteran's purchase-money home loan. Under the terms of the then existing statute (38 U.S.C., § 694(c) [Supp. IV, 1957], the Government was obligated to pay the sum if it had approved the loan. The court of appeals held the Government was entitled to summary judgment on remand of the case.

In each of the five cases reviewed above, an effort was made to obtain something from the federal Government on the basis of an assertion of right, but the defendant argued, on appeal, that he was not liable because he did not have direct dealings with an agency of the Government, or that what was sought was not "money or property" within the meaning of the Act, or that he did not personally benefit from the fraud. Rejection of these arguments, none of which brought directly into question the "assertion of right" element of the *Cohn* definition of a "claim," does not represent a disavowal of that element as a necessary ingredient of a civil cause of action under the Act.

In three other courts of appeals decisions cited by the Government, in which the Government was permitted to recover, it is doubtful that the disbursement of federal funds was made pursuant to an assertion of right. One of these cases is *United States v. Rainwater*, 8 Cir., 244 F.2d 27, *aff.* 356 U.S. 590. In *Rainwater*, the Act was

⁵ In reaching this result the court stated that it was sufficient that the false claim resulted "in the actual payment of Federal funds." 287 F.2d at 304. The Government relies on this language to demonstrate that the sole requirement for a claim under the Act is an "actual payment of Federal funds." Taken in context, however, this statement was apparently intended to explain that the Act could apply even though there was no direct disbursement of funds from the Government to the defendant.

applied to false applications submitted to the C.C.C. for the purpose of obtaining a loan on cotton. In the Eighth Circuit opinion in that case, the court dealt with the question of whether the complaint stated facts upon which relief could be granted where, as contended by the defendant, there was no specific allegation of damages. The Eighth Circuit held that the complaint was sufficient in this respect.

Neither the Supreme Court nor the Eighth Circuit Court of Appeals dealt with the question of whether the application for such a loan could be regarded as a "claim" under the Act, in the absence of any showing that the United States was legally obligated to make the loans.⁶ It is true that the defendants were found liable; and this could not have happened unless the False Claims Act was assumed to be applicable in all respects. To this extent, *Rainwater* tends to support the Government's position. However, in the absence of any discussion or resolution in the decisions of the question which concerns us, we do not regard them as having significant precedent value on the point.

These observations concerning *Rainwater* are equally applicable to *Toepleman v. United States*, 4 Cir., 263 F.2d 697, also cited by the Government.⁷

The Government also relies on *Sell v. United States*, 10 Cir., 336 F.2d 467, 473-475. The defendant in this case submitted a false application for assistance under the emergency feed program administered by the C.C.C. The application was granted and, pursuant to the agency regulations, fully negotiable purchase orders were issued. Criminal proceedings were brought against the defendant under Section 15(a) of the Commodity Credit Corporation Charter Act, 62 Stat. 1074 (1948), as amended, 15 U.S.C. § 714m(a) (1964), and civil proceedings under the False Claims Act.

⁶ The only question presented to the Supreme Court was whether a claim against the C.C.C. was a claim against the United States. The Supreme Court held that it was.

⁷ The *Toepleman* case had previously been before the Supreme Court on the precise issue as presented in *Rainwater* and was similarly decided in the *McNinch* opinion, rendered the same day as *Rainwater*. 356 U.S. at 596.

Defendant was convicted on the criminal charge and judgment was entered for the Government in the civil suit.

The only question apparently raised on appeal in the civil proceedings was whether the negotiable purchase orders issued by the C.C.C. to the defendant constituted property of the United States within the meaning of the False Claims Act. The court held that they did, and affirmed the judgment. The precise question of whether defendant's application constituted an assertion of right predicated on the Government's own liability, was not discussed. Nevertheless, since the judgment was affirmed, the decision tends to justify the Government's reliance on *Sell* to support its position.

The *Sell* decision, however, has even less precedential value than *Rainwater* or *Toepelman*, discussed above. We think the court in *Sell* erroneously equated the issues in the civil suit under the False Claims Act with those of the jointly tried criminal suit.⁸ The criminal statute, unlike the False Claims Act, does not require that a "claim" be made against the United States, but requires only the making of a false "statement" for the purpose of influencing the action of the C.C.C., or for the purpose of obtaining money, property, or anything of value.

Had the False Claims Act contained language similar to that of the criminal statute instead of being restricted to "claims" against the United States, there is no doubt that the transactions here in question would have been covered. However, as the Supreme Court said in *United States v. McNinch*, 356 U.S. 595, 599 "... the False Claims Act was not designed to reach every kind of fraud practiced on the Government."

⁸ The court said:

"The elements necessary to establish liability under the False Claims Act are set forth in the statute and the existence of all of those elements was at issue and established in the criminal action, with the exception of the requirement of the False Claims Act that the claimant be a person 'not in the military or naval forces of the United States . . .'" (336 F.2d at 475)

The decisions relied upon by the Government, and reviewed above, do not persuade us that we have erroneously interpreted the *Cohn*, *Hess* and *McNinch* decisions of the Supreme Court on the question of what constitutes a "claim" under the Act.

In our construction of the False Claims Act, we have kept in mind the warning of the Supreme Court in *McNinch*:

"... that in determining the meaning of the words 'claim against the Government' we are actually construing the provisions of a criminal statute.⁵ Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions." (Footnote omitted.) 356 U.S. at 598.

The Government argues that the construction which we place upon the False Claims Act "... would provide an open invitation to seek and obtain by deception public monies to which there is no entitlement." Assuming that this would be the result, it would not be a valid reason for giving the Act a broader interpretation than the Supreme Court has sanctioned. Moreover, if there is need for transactions such as this to be covered by the False Claims Act, Congress may do so. In any event, this contention overlooks the criminal sanctions which are available against one who makes false statements for the purpose of influencing in any way the action of the C.C.C.⁶

Accordingly, we hold that the loan applications here in question did not constitute "claims" under the Act because they were not based upon assertions of legal right against the Government. The district court therefore correctly determined that the False Claims Act is inapplicable under the undisputed facts of this ~~case~~ *case*, and properly entered judgment for defendant.

Affirmed.

⁵ This is the same criminal statute upon which a conviction was obtained in *Sell v. United States*, 10 Cir., 336 F.2d 467, discussed above.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,945

UNITED STATES OF AMERICA, Appellant,

vs.

NEIFERT-WHITE COMPANY, Appellee.

JUDGEMENT

Appeal from the United States District Court for the District of Montana. This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

Filed and entered January 20, 1967.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1967

No. 267

UNITED STATES, Petitioner,
v.

NEIFERT-WHITE COMPANY.

ORDER ALLOWING CERTIORARI—Filed October 9, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

